



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2012

Ms. Jacqueline E. Hojem
Public Information Coordinator
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2012-06954

Dear Ms. Hojem:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 453219 (MTA No. 2012-0163).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for the bid tabulation and the fee breakdowns or fee proposals submitted by each respondent shortlisted and/or selected for RFQ 1000003.¹ You state the authority does not possess the requested bid tabulations.² We understand the authority takes no position with respect to the remaining requested information. However, you believe release of the information may implicate the interests of a third party. Accordingly, you state, and provide documentation

¹The submitted information reflects the authority sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

demonstrating, the authority notified Atkins North America, Inc. (“Atkins”)³ of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by Atkins.

Initially, we note that you have submitted information other than the requested fee breakdowns and fee proposals. This information, which we have marked, is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the authority need not release such information in response to this request. Thus, we need not address Atkins’ arguments against its disclosure.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, we note the names of members of the public are generally not highly intimate or embarrassing. *See* Open Records Decision No. 551 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy). Additionally, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990).

Atkins contends the names of its employees, insurers, and subcontractors are protected under common-law privacy. Upon review, we find Atkins has failed to establish the information

³We note the authority notified Post, Buckley, Schuh & Jernigan, Inc. d/b/a PBS&J, which Atkins informs us was acquired by Atkins in 2011.

it seeks to withhold under common-law privacy is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, this information is not confidential under common-law privacy, and the authority may not withhold it under section 552.101 on that ground.

Atkins also raises section 552.104 of the Government Code. This section excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the authority does not seek to withhold any information pursuant to this exception, no portion of Atkins’ information may be withheld on this basis.

Atkins also submits arguments against disclosure of some of the information under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

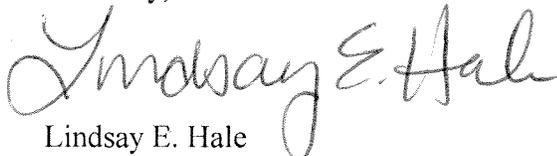
Atkins argues some of its information, including its pricing and subcontractor information, is commercial or financial information, release of which would cause substantial competitive harm to Atkins. Upon review of Atkins’ arguments, we find Atkins has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of Atkins’ responsive information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Additionally, we note the pricing information of the winning bidder on a government contract, such as Atkins, is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged

government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. As such, we conclude the authority may not withhold any of the responsive information under section 552.110(b) of the Government Code. As no further exceptions to disclosure have been raised, the authority must release the responsive information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 453219

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jay Jayaram
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Filed in The District Court
of Travis County, Texas

JUN 18 2015 MUR
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CAUSE NO. D-1-GN-12-001601

At Velva L. Price, District Clerk

ATKINS NORTH AMERICA, INC.
Plaintiff,

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IN THE DISTRICT COURT

v.

261ST JUDICIAL DISTRICT

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

Plaintiff Atkins North America, Inc., (“Atkins”) and Defendant Ken Paxton, Attorney General of Texas¹, agree that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Atkins to challenge Letter Ruling OR2012-06954 (the “Ruling”). The Metropolitan Transit Authority of Harris County (the “MTA”) received a request from Ted Sims of The Sithe Group (the “Requestor”) pursuant to the Public Information Act (the “PIA”), Tex. Gov’t Code ch. 552, for certain bid tabulation materials submitted to the MTA. These documents contain information Atkins claims is confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA (“Atkins Information”). The MTA requested a ruling from the Open Records Division of the Office of the Attorney General (“ORD”). ORD subsequently issued the Ruling, ordering the release of the Atkins Information. The MTA holds the information that has been ordered to be disclosed.

The parties represented to the Court that: (1) pursuant to Tex. Gov’t Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn its request, (2) in light of this withdrawal the lawsuit is now moot, and (3)

¹ Greg Abbott was sued in his official capacity as the Attorney General of Texas. Ken Paxton is the successor in office to Greg Abbott as the Attorney General of Texas and is the proper defendant in this lawsuit.

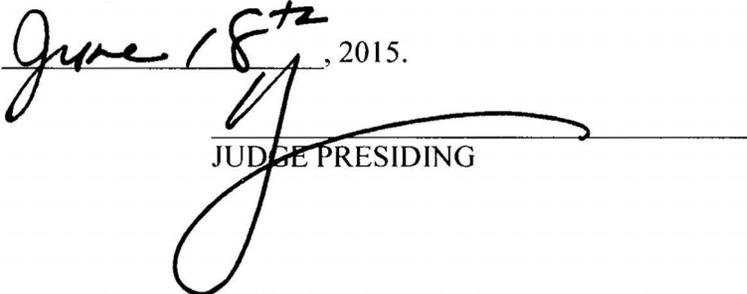


pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

1. Because the request has been withdrawn, no Atkins Information should be released in reliance on Letter Ruling OR2012-06954. Letter Ruling OR2012-06954 should not be cited for any purpose related to the Atkins Information as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the Court signing this Final Judgment, the Office of the Attorney General shall notify the MTA in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct the MTA that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2012-06954 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Atkins Information in reliance on said Ruling, and if the MTA receives any future requests for the same or similar Atkins Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2012-06954.
3. All costs of court and attorney fees are taxed against the parties incurring same.
4. All other requested relief not expressly granted herein is denied.
5. This cause is hereby DISMISSED without prejudice.
6. This order disposes of all the parties and all the claims and is final.

SIGNED on June 18th, 2015.



JUDGE PRESIDING

AGREED:



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